

THE WHITE HOUSE

WASHINGTON

June 5, 1986

MEMORANDUM FOR PETER J. WALLISON

FROM: ALAN CHARLES RAUL *ACR*
SUBJECT: Summary Information Regarding
Certain Judges

This memorandum sets forth summary information (distilled mostly from press accounts) and conclusions regarding Judges Scalia, Bork and Winter, and Justice Rehnquist. I have concentrated on Judges Scalia and Bork. Please advise if you would like me to follow up on any of the preliminary thoughts expressed here.

ANTONIN SCALIA

Biographical Information

AGE: 50
BORN: March 11, 1936, Trenton, New Jersey
COLLEGE: Georgetown University, A.B. 1957
LAW SCHOOL: Harvard Law School, LL.B., 1960
MILITARY: Apparently none
PARTY: Republican
RELIGION: Probably Roman Catholic
FAMILY: Married since 1960; nine children
RESIDENCE: McLean, Virginia
HEALTH: No negative indications
(See attached biographical materials.)

Judicial History

APPELLATE COURT: D.C. Circuit, appointed by President Reagan,
1982

Professional Experience

Visiting Professor, Stanford Law School, 1980-81.
Professor, University of Chicago Law School, 1977-82.
Resident Scholar, American Enterprise Institute, 1977.
Visiting Professor of Law, Georgetown University Law School, 1977.
Assistant Attorney General, Department of Justice, 1974-77.
Chairman, U.S. Administrative Conference, 1972-74.
General Counsel, Office of Telecommunications Policy, Executive Office of the President, 1971-72.
Professor, University of Virginia Law School, 1967-71.
Sheldon Fellow, Harvard University, 1960-61.
Private practice in Cleveland, Ohio, 1960-67.

General Considerations and Confirmability

Scalia has been a life-long conservative. Supposedly, even while in law school, he chided classmates about favoring excessive government regulation. He was a hardcore Goldwater supporter and a fan of Bill Buckley and the National Review.

Scalia is said to be "phenomenally well prepared" at oral argument -- he reads all the briefs himself, rather than relying on clerks' summaries. He also writes his own opinion, sometimes without using clerks' drafts. Scalia writes well and is accessible to the non-lawyer. Though he is called an archconservative, he is also an independent thinker who does not bend his principles to suit the circumstances. According to reports, for example, when he served in the Nixon White House he actively opposed a plan to control certain programming on public television. In 1985, he struck down part of a deregulatory scheme adopted by FERC to loosen government controls over natural gas prices. In another case, Scalia, joined by Judges Bork and Starr, decided that Washington's M.T.A. acted unconstitutionally in refusing to rent subway advertising space to someone who wanted to post an anti-Reagan photomontage.

Like Bork, Scalia is uniformly considered a first-rate legal scholar. Even liberal Democrats concede this. The confirmation process, consequently, should be relatively easy, especially in light of the fact that a conservative Justice is being replaced. Also enhancing Scalia's confirmation prospects, I would imagine, is the fact that he is an Italian-American -- he would be the first appointed to the Supreme Court. Another significant point is that he does not seem to have antagonized any particular groups or powerful individuals in his rise to prominence.

No press accounts raise the issue of Judge Scalia's health. All indications are that he is an extremely vigorous and dynamic fifty-year-old. He is described as an extroverted, hail-fellow well-met-type person. According to a feature story in American

Lawyer on Judge Scalia (Tab A), his personality has imbued the previously fractious D.C. Circuit with a general feeling of good will and collegiality. He is thought of as a consensus-builder who blunts disagreement, rather than sharpens it. He is said to differ in this regard from Judge Bork, who is more contentious. Judge Scalia is described by former D.C. Circuit clerks as more of a leader than Bork. He started strong on the D.C. Circuit and did not, even initially, defer unduly to other judges, including Bork. His political savvy and forcefulness are evidently quite impressive.

A couple of minor difficulties could arise in a Scalia nomination. He received only a "qualified" rating from the ABA when he was considered for the D.C. Circuit. (Bork, by comparison, received an "exceptionally well-qualified.") A higher rating was not bestowed, apparently, due to Scalia's relative inexperience in the courtroom. This handicap may have now abated as a result of Judge Scalia's almost four years on the bench. (Although the need for experienced litigators on the Supreme Court, in any event, is questionable, Sandra Day O'Connor faced the same ABA problem during her confirmation. The ABA had reported that, from a professional standpoint, she was "only qualified." Nonetheless, she sailed through the Senate without a nay vote.)

Another negative factor, however, could be Scalia's position on the First Amendment and libel law. A conservative columnist, William Safire, denounced Scalia as the "worst enemy of free speech." See New York Times column, April 29, 1985. The causus belli for Safire's attack was Scalia's dissent in Ollman v. Evans and Novak the case where a Marxist economics professor sued columnists for libel because they called him a Communist. Scalia dissented from the court's en banc decision in favor of the defendants. (Judge Bork concurred in favor of the defendants.) Scalia reasoned that the column's defamatory statement was not opinion, but rather was a garden variety libel. (Judge Bork's concurrence was pro-free speech in that he argued for construing "opinion" broadly, thereby enlarging the scope of the constitutional defenses available to the columnists.) Judge Scalia's approach is anathema to the media since it would allow a greater number of libel cases to proceed to trial.

(Another potential confirmation issue is that Judge Scalia is -- or was -- a member of Washington's all-male Cosmos Club.)

Other than Safire, however, the media appear to have treated Scalia extremely well. Recent press accounts suggest he may have "eclipsed" Bork as the likely next Supreme Court nominee. (E.g., Newsweek, June 10, 1985, Tab B.) It is noted that Scalia is nine years younger than Bork, and perhaps more conservative.

Judge Scalia also has a good track record in cases appealed to the Supreme Court. As of early 1985, the Supreme Court agreed to review three out of the four cases in which Scalia dissented and in which the losing party appealed to the Supreme Court. Even more impressive, the Supreme Court did not review any of the fifty-three majority decisions he authored.

Overall Judicial Philosophy

Judge Scalia believes in a strong executive, a strong legislature and a relatively weak court. Strong emphasis on "separation of powers" is the hallmark of his jurisprudence. Prior to becoming a judge, Scalia drafted the ABA's amicus brief in Chadha in which he argued that the one-House legislative veto was unconstitutional. On the bench, he has been particularly deferential to the military, and the executive's conduct of foreign affairs.

Judge Scalia has said that courts are bad at, and therefore the wrong institution for, organizing society, spending money and generally getting things done. (See Policy Review, Tab C.) Scalia has supposedly said that the judiciary exists not to balance majority interests but to defend a short list of individual minority rights. In his dissents, he often chides colleagues not to get involved in extra-judicial matters.

Scalia, an administrative law specialist, believes that Congress has delegated too many policy judgments to the agencies. As a result, neither Congress nor the President can properly supervise the results. He said in 1979 that policy judgments require political decisions and should be made by elected representatives. If Congress fails to make the hard choices by enacting legislation, agencies should not do Congress' work by implementing policies that were never embodied in a statute.

This analysis plainly bespeaks judicial restraint and suggests Scalia would not be an activist judge or rely on his own preferences to fill interstices in legislation. This approach, however, does not necessarily signify a "limited government" philosophy, because he does recognize Congress' broad power to make choices. On the other hand, he would resist stretching the terms of legislation beyond what Congress narrowly addressed. In a sexual discrimination case, for example, Scalia dissented (with Bork) from a decision extending the civil rights laws to cover sexual harassment in the workplace.

Further evidence of Scalia's conservative approach to statutory construction is his view on legislative history. He has noted that Committee reports should be given only marginal significance in interpreting laws because they generally do not come to the attention of, much less are approved by, the enacting members of Congress. He thus cautions against "routine deference" to such reports since they are usually prepared by

liberal committee staffers who use the opportunity to gloss statutes with a more sweeping meaning than Congress would have approved. On the other hand, he indicated that the President's "signing" statement could be looked at as evidence of executive intent.

Positions on Critical Issues

Criminal Justice. Scalia is not especially known for his views on criminal matters.

Federalism. Scalia is not especially known for his views on states' rights.

Separation of Powers. This is the major area in which Judge Scalia leaves his mark. Scalia wrote the lower court decision holding Gramm-Rudman unconstitutional. In another case, he rejected arguments by members of Congress that the President could not constitutionally support the Contras in Nicaragua. He felt that case involved a non-justiciable, political question. He manifested concern in this decision that U.S. foreign policy not be obstructed. Scalia also authored the panel's opinion in Ramirez v. Weinberger holding against a U.S. citizen who claimed that his ranch in Honduras was "taken" by the U.S. in violation of the Fifth Amendment. The D.C. Circuit reversed en banc, but the Supreme Court upheld Scalia's position.

Economic Matters. Scalia has voted with Judge Bork in a number of cases involving economic regulation. He is known to oppose excessive government regulation. He dissented, for example, in a case where the majority overturned the FDA's decision not to regulate the drugs used for capital punishment. This opinion suggests that he would draw narrow lines on regulatory matters. The Supreme Court agreed with Judge Scalia in Heckler v. Chaney. In another case, however, he held that FERC's deregulation of natural gas prices was improper.

Other Cases. Judge Scalia dissented from the D.C. Circuit's ruling in Community for Creative Non-Violence v. Watt that sleeping by demonstrators in Lafayette Park was a protected First Amendment right. He indicated that "symbolic speech," such as sleep, was not protected because the constitutional guarantee does not cover all forms of expression. The Supreme Court reversed in favor of Scalia's position.

MATERIALS SUBMITTED BY
THE DEPARTMENT OF JUSTICE
JUDGE SCALIA

ANTONIN SCALIA

Judge Scalia is also an articulate and devoted adherent to the interpretivist theory of adjudication described more extensively in the memorandum on Judge Bork. Scalia's primary focus has been on separation of powers, justiciability and administrative law questions. He has repeatedly emphasized that the judicial role is solely to decide the rights of individuals. Thus, absent an express statutory mandate, he denies standing to persons who seek to have courts resolve generalized grievances and otherwise assiduously ensures that cases are susceptible to judicial review, most notably in a number of ground-breaking opinions on congressional standing. Scalia couples his appreciation for the limited role of the courts with respect for coordinate branches and has written several very significant opinions dealing with the deference due to the Executive, particularly in foreign affairs and the enforcement of laws.

In short, Scalia's judicial philosophy almost precisely mirrors that of Bork, with the exception of one subtle difference in emphasis which may affect their decision-making in a quite narrow range of cases. In seeking to determine the breadth of rights contained in the constitutional text, Scalia would probably be more inclined than Bork to look at the language of the constitutional provision itself, as well as its history, to determine if it grants an affirmative mandate for the judiciary to inject itself into the legislative process. Absent such an affirmative signal, Scalia's natural belief in the majoritarian process and his innate distrust of the judiciary's ability to implement, or even to discern, public policy or popular will, would probably lead him to leave undisturbed the challenged activity. While Bork certainly shares these precepts of judicial restraint, he will be somewhat more inclined in certain circumstances to give broader effect to a "core" constitutional value. Bork would look less to history, and more to the general theory of government reflected by the Constitution's overall structure, to provide guidance on the limits of judicial action. In the broader scheme of things, this divergence is quite minor, but it is the reason that Scalia severely criticized Bork's "sociological jurisprudence" in the Ollman libel case.

Scalia is obviously a superb intellect and scholar who has produced an extraordinarily impressive body of academic writings on a broad range of issues, particularly administrative law. He has also written probably the most important opinions of any appellate court judge during the last 4 years, without a single mistake. While he has not focused on the "big picture" jurisprudential questions to quite the same extent as Bork, his writings on separation of powers and jurisdictional questions reflect a fundamental, well-developed theory of jurisprudence in an area that had received all too little attention. He also reasons and writes with great insight and flair,

which gives additional influence to his opinions and articles. He has been particularly diligent in ferreting out bad dicta in his colleagues' opinions and otherwise aggressively attempted to reshape the law through dissents and en banc review. Like Bork, he would not slavishly adhere to erroneous precedent. More so than Bork, he is generally respected as a superb technician on "nuts and bolts" legal questions.

Scalia is an extremely personable man, although potentially prone to an occasional outburst of temper, and is an extremely articulate and persuasive advocate, either in court or less formal fora. Unlike Bork, he would have to undergo a relatively brief "get-acquainted" period on the Supreme Court and it is conceivable that he might rub one of his colleagues the wrong way. Scalia's background as a private practitioner for six years, a law professor at the University of Virginia, Georgetown, and Chicago, Counsel to the Office of Telecommunications, Assistant Attorney General for the Office of Legal Counsel, and a judge on the U.S. Court of Appeals for the D.C. Circuit, makes abundantly clear his technical qualifications. While he received only a "qualified" rating from the American Bar Association for the D.C. Circuit, this can only be described as slanderous nonsense. Scalia just turned 50 years old and exercises regularly. Although he smokes heavily, and drinks, he should have a lengthy career on the Court.